FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

May 30, 2007

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on behalf	:	
of LAWRENCE PENDLEY,	:	Docket No. KENT 2007-265-D
Complainant	:	MADI CD 2007-05
	:	
v.	:	
	:	
HIGHLAND MINING COMPANY, LLC,	:	Mine ID 15-02709
Respondent	:	Highland No. 9 Mine

Appearances: Jonathan Hammer, Esq., James Brooks Crawford, Esq., U.S. Department of Labor, Arlington, Virginia, on behalf of the Complainant
Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, on behalf of the Respondent

Before: Judge Barbour

ORDER OF TEMPORARY REINSTATEMENT

On March 22, 2007, Lawrence L. Pendley filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA). The complaint alleged Highland Mining Company ("Highland") discharged Pendley as the result of "[c]ontinuous harassment from filing [a] safety complaint in October 2006." *Appl. for Temp. Reinstat't, Exh. B* 2.[1] The complaint was investigated by MSHA Senior Special Investigator Kirby Smith, and on April 25, 2007, the Secretary filed an Application for Temporary Reinstatement. The application seeks Pendley's reinstatement as a maintenance/parts delivery person, the position he held on March 21, or to an equivalent position at the same rate of pay and with the same benefits.

In the application the Secretary expanded on Pendley's complaint and asserted Pendley was discharged "because the company apparently believed . . . based upon [Pendley's] previous protected activity . . . [he also] was making safety complaints regarding the condition of the mining equipment in the . . . mine, including complaining . . . coal had accumulated on the 3C belt in depths from 12-24 inches." Appl. 2. The allegation about a prohibited accumulation

[1]The complaint lists March 21, 2007, as the "Date of Discriminatory Action." *Appl. for Temp. Resinst't, Exh. B* at 1. Pendley was suspended with an intent to discharge on March 21 and was discharged on March 26.

referred to an oral complaint telephoned to MSHA on March 21 by an unidentified miner. The telephoned complaint resulted in an inspection pursuant to section 103(g) of the Act (30 U.S.C. § 813(g))[[2]] and to the citation of Highland for a violation of 30 C.F.R. § 75.400.[3]

The case was assigned to me on April 25, 2007. On the following day, in a conferenced telephone conversation with counsels and Pendley, counsel for Highland stated the company desired a hearing on the application. I replied I would be unable to hear the matter within the ten days specified in Commission Rule 45(c). 29 C.F.R. § 2700.45(c). The first date I could hear the case was May 22, 2007, and I offered to request the case be reassigned to another judge. Counsels and Pendley advised me they were willing to waive the rule's timelines and go forward on May 22. The matter was heard on that date in Evansville, Indiana. At the close of the hearing, counsel for Highland moved the application be dismissed. I deferred ruling. For the reasons stated below, the motion is **DENIED** and the Secretary's application is **GRANTED**.

THE LAW

When a discharged miner lodges a discrimination complaint, the Secretary shall investigate the complaint, and if she "finds the complaint was not frivolously brought" she may apply for the complainant's reinstatement pending a final order on the complaint. 30 U.S.C. § 815(c)(2). If a hearing is held on the application, "the scope of . . . [the] hearing . . . is limited to a determination as to whether the . . . complaint was frivolously brought." 30 C.F.R. 2700.45(d); *see* 30 U.S.C. § 815(c)(2). In *Jim Walter Resources, Inc. v. Federal Mine Safety and Health Review Commission,* 920 F. 2d 738-747 (11th Cir. 1990), the court described a "not frivolously brought" determination as a finding the complaint was "not insubstantial or frivolous" and "not clearly without merit." 920 FMSHRC at 747 and n.9.

As I noted in a letter addressed to counsels prior to the hearing, while the burden of proof is on the Secretary, the burden is light. Commission Judge Arthur Amchan well described how a judge should analyze whether the Secretary has carried the burden. If the judge concludes it is "possible, but by no means certain, that the Secretary could prevail in a discrimination proceeding," then the application should be granted. *Secretary on behalf of Loy Peters, etc. v. Thunder Basin Coal Co.*, 15 FMSHRC 2290, 2293 (November 1993); *aff'd* 15 FMSHRC 2415

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[2]Section 103(g) in pertinent part provides that a miner with reasonable grounds to believe a violation of a mandatory safety standard exists may file a complaint with MSHA and, upon receipt of the complaint, the agency shall conduct a special investigation "as soon as possible." 30 U.S.C. § 813(g). The section also provides the complaint be reduced to writing and a copy be given to the operator no later than the time of inspection. The section further mandates the name of the miner making the complaint shall not appear in the copy. *Id.*

[3]Section 75.400 prohibits accumulations of coal dust, loose coal and other combustible materials in the active workings of a mine.

(December 1993). The conclusion must be made within the framework of the elements of proof of a Mine Act discrimination proceeding, which means, among other things, the judge must determine whether the Secretary has shown the complainant engaged in protected activity, and that the adverse action was motivated in part by that protected activity. *Secretary ex rel. Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. V. Marshall*, 663 F. 2d 1211 (3rd Cir. 1981); *Secretary ex rel. Robinette v. United Castle Coal Co.*, 3 FMSRHC 803 (April 1981).

PROTECTED ACTIVITY AND REINSTATEMENT

At the heart of the contention Pendley's discharge violated the Act is the allegation Pendley was let go because of his past discrimination complaints and because Highland's management believed he filed the section 103(g) complaint with MSHA. The filing of complaints under sections 105(c) and 103(g) is protected. An operator cannot discharge an employee because he or she engaged in protected activity. The operator can, however, prevail by showing the discharge was in no part motivated by protected activity, or by proving it also was motivated by the miner's unprotected activity and the operator would have taken adverse action for unprotected activity alone. *Pasula* 2 FMSHRC at 2800; *Robinette*, 3 FMSHRC at 817-818; *see Eastern Assoc. Coal Corp. v. FMSHRC*, 13 F. 2d 639, 642 (4th Cir. 1987).

There is no doubt Pendley engaged in protected activity by filing a complaint with the Secretary pursuant to section 105(c)(1) prior to his discharge. The Secretary investigated that complaint and, on September 25, 2006, she filed a complaint on behalf of Pendley alleging he was suspended for three days without pay for making safety complaints to MSHA. The September complaint involved the hazardous sudden stopping of the mine hoist while it was bringing Pendley underground. Pendley believed the incident involved Jack Creighton, a fellow miner. Pendley also claimed Creighton harassed him in various ways and that the harassment was a safety risk. The Secretary's complaint was docketed as KENT 2006-506-D.[4]

[4]As the parties and I are well aware, the docket has a convoluted history. After the complaint was filed, it was the subject of a settlement agreement between the Secretary and Highland, a settlement I approved. *Order Approving Settlement* (January 18, 2007). Pendley objected to the settlement, claiming he was not a party to the agreement. The Commission treated the objection as a petition for review. It vacated the order approving the settlement, reopened the case and remanded the matter to me for "appropriate proceedings." 29 FMSHRC ___(April 3, 2007). Prior to and at the temporary reinstatement hearing, counsels, Pendley and I discussed the nature of the further "appropriate proceedings." We agreed the remanded case should effectively be stayed pending a decision by the Secretary whether to file a complaint on Pendley's behalf based on Pendley's March 22, 2007, complaint (the complaint which initiated the temporary reinstatement application). We further agreed if a discrimination proceeding is filed following the completion of the Secretary's investigation of the March 22 complaint, Docket No. KENT 2006-506 will be consolidated with that proceeding and the cases will be disposed of together. With this in mind, it is imperative the Secretary promptly complete her

I grant the application for temporary reinstatement because I find it is "possible, but by no means certain" (*Peters*, 15 FMSHRC at 2293; *aff'd* 15 FMSHRC 2415 (December 1993)) the Secretary could prevail on the allegation Pendley was suspended "based on previous protected activity." *Appl. for Temp. Reinstat't* at 2. The Commission has recognized, "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.,* 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F. 2d 86 (D.C. Cir. 1983). In *Chacon* the Commission listed some of the common circumstantial indicia of discriminatory intent: (1) the knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in the time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Secretary of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (September 1999).

Here, the company obviously knew of the prior complaint involving the hoist and the alleged harassment of Pendley by Creighton. Pendley's suspension on March 21, 2007, and his termination of March 26 followed another run-in with Creighton, a confrontation also involving the hoist. Thus, the March 21 incident with Creighton again raised for the company the alleged problems with the hoist and Pendley's prior complaints about Creighton's alleged harassment. On the same day as the March 21 events, Pendley was suspened with an intent to discharge. There was a clear coincidence in time between the protected activity and Pendley's discharge.

In addition, there was apparent disparate treatment handed out to Pendley in that following the disagreement with Creighton after the hoist incident on March 21, Pendley was suspended with an intention to discharge and then was fired. One of the reasons the company gave for terminating Pendley's employment was he assaulted Creighton. Resp. Exh. 2. (The "assault" involves a disputed push or shove Pendley allegedly gave Creighton when Pendley encountered Creighton at the hoist control panel on March 21. At the time, Creighton was allegedly participating in a safety test of the hoist.) The company maintained this was one of the reasons for terminating Pendley, because after a prior incident with Creighton – an incident about which Pendley complained – Pendley had been given a "last and final warning" by the company because he "threatened violent behavior." Exh. R-1. However, Creighton, who agreed he had difficulties involving Pendley, was not subject to the discipline given Pendley. Creighton was reprimanded, but never was given a "last and final . . . warning," even though he agreed he had threatened to shove a gun down Pendley's throat.

The fact Pendley was terminated following another occurrence involving the hoist and Creighton, while Creighton was not given a last and final warning even after he "threatened violent behavior," leads me to conclude Pendley's complaint was not frivolous and it is possible the Secretary could prevail.

The possibility of prevailing is enough to warrant Pendley's temporary reinstatement.

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investigation.

However, the holding should not be taken as an indication the Secretary ultimately will prove the company violated section 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1). The company argues, and may well establish, even given Pendley's protected activity, Pendley still would have been discharged. The company alleges one reason for his discharge is that he harassed and orally abused the company's controller, Sheila Gaines; its payroll clerk, Sharon Hubbert; and its mine account manager, Roger Wise. It further alleges the March 21 incident involving the hoist and Creighton actually constituted interference by Pendley with a safety procedure and a physical assault on Creighton. *See* Exh. R-2. However, the merits of these contentions are beyond the scope of this order. Rather, they constitute at least part of a defense the company will presumably put forward at a hearing if a discrimination complaint is filed by the Secretary.

Finally, although in seeking temporary reinstatement the Secretary alleged the filing of a section 103(g) complaint and the resulting issuance of a violation based on that complaint was a reason for Pendley's dismissal, she essentially offered little evidence to link the complaint and the citation with the allegedly prohibited suspension with intent to discharge. Given my finding the evidence regarding Pendley's prior protected complaint, his March 21 conflict with Creighton and his subsequent suspension and termination is sufficient to send Pendley temporarily back to work, I do not need to decide if the allegations regarding the section 103(g) complaint and the resulting citation are valid reasons for Pendley's reinstatement. I note, however, the Secretary's evidence is what can charitably be described as "weak." Indeed, a review of the record confirms the Secretary established little more than the section 103(g) inspection and the resulting citation occurred the same day as Pendley's suspension with intent to discharge. Should a section 105(c)(2) (30 U.S.C. § 815(c)(2)) complaint be filed by the Secretary, more than what was offered will have to be shown to establish the section 103(g) complaint and the citation are reasons to find Highland discriminated against Pendley. At this point, however, such concerns are matters for another day. The only issue now before me is whether Pendley's complaint was frivolously brought, and I conclude the Secretary has established it was not.

ORDER

Highland **IS ORDERED** to reinstate Lawrence Pendley to the position from which he was suspended with intent to discharge on March 21, 2006, or to an equivalent position, at the same rate of pay and with equivalent duties.

David F. Barbour
Administrative Law Judge
(202) 434-9980

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